

PHILIP J. GREENE
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 ASP - P.O. BOX 9
 AVALON, CA. 93204
 PETITIONER,
 IN PRO PER

FILED

JAN 30 2008

RICHARD W. WIEKING
 CLERK, U.S. DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT,
 FOR THE NORTHERN DISTRICT OF CALIFORNIA.

CV 08

0714

CASE #

PHILIP J. GREENE
 PETITIONER

VS.

E-filing

MOTION TO FILE NEWLY
 EXHAUSTED CLAIM VIA
 SECOND PETITION - ABUSE
 OF DISCRETION BY SENTENCING
 COURT.

HARTLEY - ASP WARDEN,
 RESPONDENT.

MMC
 (PR)

COMES NOW, PHILIP J. GREENE, PETITIONER IN THE ABOVE TITLED ACTION, AND A CALIFORNIA PRISONER PROCEEDING PRO PER, PETITIONS THIS COURT UPON MOTION TO FILE A NEWLY EXHAUSTED CLAIM VIA SECOND PETITION FOR WRIT OF HABEAS CORPUS, CHALLENGING AN ABUSE OF DISCRETION BY THE SENTENCING COURT AS CLAIMED AND ALLEGED WITHIN THE ENCLOSED PETITION FOR WRIT OF HABEAS CORPUS.

PETITIONER, FILED AN AMENDED PETITION FOR WRIT OF HABEAS CORPUS WITHIN THIS COURT ON JANUARY 22, 2007 IN CASE NUMBER C-05-3433 MMC (PR) CHALLENGING HIS CONVICTION ON THREE CLAIMS: 1) VIOLATION OF DUE PROCESS AND SPEEDY TRIAL; 2) PROSECUTION VIOLATED DUE PROCESS BY KNOWINGLY SUPPRESSING EXCULPATORY EVIDENCE; 3) VIOLATED DUE PROCESS BY PROSECUTING OUT OF VINDICTIVENESS. THIS PETITION AND ACTION IS CURRENTLY IN PROCESS; RESPONDENT IN THAT ACTION WAS ORDERED TO RESPOND - FILED IN AUGUST 2007 AND PETITIONER FILED HIS TRAVERSE IN SEPTEMBER 2007.

HOWEVER, THE ENCLOSED PETITION AND NEWLY EXHAUSTED CLAIM WAS FILED WITHIN THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA ON MARCH 13, 2007, AFTER PETITIONER EXHAUSTED HIS ADMINISTRATIVE REMEDIES. THIS CLAIM HAS BEEN FULLY EXHAUSTED AT THE STATE LEVEL BASED ON THE CASE OF CUNNINGHAM V. CALIFORNIA, 127 S.C.T. 856 (2007) AND THE ISSUES DISCUSSED AND CONTAINED WITHIN THE PETITION AND ATTACHED EXHIBITS.

PURSUANT TO SINGLETON V. NORRIS, 531 U.S. 8 (2000), 319 F.3d 1018 - HABEAS PETITION RAISING A CLAIM THAT HAD NOT BEEN ARISEN AT THE TIME OF A PREVIOUS PETITION IS NOT BARRED BY RESTRICTIONS ON SECOND OR SUCCESSIVE

PETITIONS OR AN ABUSE OF THE WRIT.

IN THE CASE OF IN RE CAIN, C.A. 5, 1998 137 F.3d 234 CONGRESS DID NOT INTEND FOR INTERPRETATION OF PHRASE "SECOND OR SUCCESSIVE" AS USED IN A.E.D.P.A. PROVISION CURTAILING AVAILABILITY OF SUCCESSIVE HABEAS CORPUS APPLICATIONS, TO PRECLUDE FEDERAL DISTRICT COURTS FROM PROVIDING RELIEF FOR ALLEGED DUE PROCESS VIOLATION RELATING TO ADMINISTRATION OF SENTENCE OF PRISONER WHO HAS PREVIOUSLY FILED A PETITION CHALLENGING VALIDITY OF HIS CONVICTION OR SENTENCE, BUT WHO IS NEVERTHELESS NOT ABUSING THE WRIT. (SEE ALSO: 28 U.S.C. SECTION 2244(6)(3)(A)).


PURSUANT TO THE ABOVE CASES, THIS COURT HAS THE AUTHORITY TO FILE AND ACCEPT, AS WELL AS TO PROCEED, WITH THE ENCLOSED PETITION FOR WRIT OF HABEAS CORPUS WITHOUT REQUIRING PETITIONER TO SEEK AN ORDER AUTHORIZING THE DISTRICT COURT TO CONSIDER SUCH PETITION, FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITIONER FILES THIS MOTION AND ENCLOSED PETITION FOR WRIT OF HABEAS CORPUS IN GOOD FAITH, CHALLENGING THE IMPOSITION FOR THE THREE YEAR ENHANCEMENT PORTION OF HIS SENTENCE, AND NOT THAT OF HIS CONVICTION.

PETITIONER RESPECTFULLY REQUESTS THIS COURT TO FILE SUCH PETITION IN A NEW CIVIL CASE, ISSUE AN ORDER TO SHOW CAUSE, AND ULTIMATELY GRANT THE RELIEF SOUGHT. A "PRISONER'S IN FORMA PAUPERIS APPLICATION" IS SUBMITTED CONTEMPORANEOUSLY.

DATED: 1/22/08

RESPECTFULLY SUBMITTED;


 PHILIP J. GREENE
 PETITIONER,
 IN PROPER.